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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 138

KENTUCKY WHIP AND COLLAR COMPANY, PETITIONER

v.

ILLINOIS CENTRAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the District Court for the Western District of Kentucky (R. 29–40) is reported in 12 F. Supp. 37, and the opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 84 F. (2d) 168.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 1, 1936 (R. 48). The petition for certiorari was filed on June 29, 1936, and granted on October 12, 1936 (R. 53). The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Act of Congress approved July 24, 1935, 49 Stat. 494 (49 U. S. C. A. 6164), commonly known as the Ashurst-Sumners Act, is a valid exercise of the powers granted to Congress by the Constitution.

STATUTE INVOLVED

The Act of Congress approved July 24, 1935, c. 412, 49 Stat. 494 (49 U. S. C. A. 6164), commonly known as the Ashurst-Sumners Act, follows:

> CHAP. 412.—An Act To prohibit the interstate transportation of prison-made products in certain cases.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction

thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

SEC. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

SEC. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of

not more than $1,000, and such goods, wares, and merchandise shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

SEC. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act.

STATEMENT

The decision of this cause will require a determination as to whether the Ashurst-Sumners Act is a valid exercise of the constitutional powers of Congress. Because the United States is directly interested in this question it is filing this brief *amicus curiae*.

Petitioner, by bill in equity filed on August 17, 1935, in the District Court for the Western District of Kentucky (R. 1), prayed that the respondent, a common carrier by rail, be mandatorily enjoined to accept and transport each of twenty-five separate shipments of collars and harness tendered to the respondent at its freight station at Eddyville, Kentucky, for transportation to other states (R. 23). The bill also prayed for a binding declaration of

rights between petitioner and respondent, decreeing and adjudging the Ashurst-Summers Act to be unconstitutional (R. 23).

The bill alleged the following facts: The petitioner, Kentucky Whip and Collar Company, is a Kentucky corporation engaged at Eddyville, Kentucky, in the manufacture of horse collars and strap goods, and markets the articles which it manufactures throughout the United States. In the manufacture of the articles it employs the labor of convicts confined in the Kentucky State Penitentiary (R. 1). The respondent, Illinois Central Railroad Company, an Illinois corporation, is a common carrier by rail (R. 1). The goods manufactured by petitioner and sold and shipped in interstate commerce are alleged to be "useful articles of commerce and are not in any particular whatever harmful to the health or to the peace, good order, or general welfare of the communities into which they are shipped or in which they are used" (R. 2).

Prior to the filing of the bill petitioner tendered to respondent at its freight station at Eddyville, Kentucky, twenty-five separate shipments of horse collars and harness manufactured by petitioner with prison labor at its plant in Eddyville, Kentucky, for the purpose of having the shipments transported by respondent to consignees each of whom was located in a state other than Kentucky. Ten of the shipments were consigned to customers in ten different states whose laws prohibited the

sale within their borders of any goods or merchandise manufactured wholly or in part by convict labor. Five of the shipments were intended for consignees in states whose laws require that goods made by convict labor and exposed for sale, or sold, shall be plainly marked so as to show that they are convict made. Ten of the shipments were consigned to consignees in states whose laws imposed no restriction on the sale or possession of goods made by convict labor. None of the packages or articles tendered to the respondent for transportation were labelled so as to indicate that the goods were manufactured or produced by prison labor. The respondent refused to accept or transport the shipments and upon each bill of lading endorsed the following words, "Shipment refused because prohibited by Act of Congress approved July 24, 1935" (R. 4–30). It is further alleged that it will be the policy of the respondent to continue to refuse shipments from this plaintiff of goods made by prison labor where the transportation of such shipments would violate the terms of the Ashurst-Summers Act (R. 30).

On August 24, 1935, respondent filed a motion to dismiss the bill of complaint on the grounds, among others, that the bill set forth no facts which entitled the plaintiff to relief, that the Ashurst-Summers Act is constitutional, and that the bill of complaint on its face showed a lack of equity (R. 24–25).

By stipulation the cause was submitted to the District Court for final disposition upon the bill, upon petitioner's motion for a final decree, and upon the respondent's motion to dismiss the bill (R. 25).

The District Court rendered an opinion on October 3, 1935, in which it held that the Ashurst-Sumners Act was constitutional in so far as it required the labelling of goods made by convict labor, but unconstitutional to the extent that it prohibited the shipment of such goods in interstate commerce, that the provisions of the Act were separable in this respect, and that inasmuch as none of the shipments tendered by petitioner were labelled, the bill should be dismissed (R. 29–40). The District Court made findings of fact and conclusions of law and entered a decree dismissing the bill on October 9, 1935 (R. 40–43).

The District Court's conclusions of law were in accordance with its opinion. Its findings of fact followed substantially the allegations of the bill with one important exception. The court found that petitioner's products are useful articles of commerce and not in themselves in any particular harmful to the health, peace, or good order of the communities into which they are shipped or in which they are used (R. 41), but in response to a motion by petitioner for an additional finding of fact (R. 43–44), the District Court refused to find that the articles manufactured by the plaintiff in

and of themselves are not harmful to the general welfare of the communities into which they are shipped (R. 44).

The decree of the District Court was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit on June 1, 1936 (R. 48). In its opinion the Circuit Court of Appeals held that the Ashurst-Sumners Act was constitutional in its entirety (R. 48–52).

In both the District Court and the Circuit Court of Appeals the United States appeared as *amicus curiae* and filed a brief and participated in the oral argument.

ARGUMENT

I

THE PURPOSE AND SCOPE OF THE ASHURST-SUMMERS ACT

Section 1 of the Ashurst-Sumners Act makes it unlawful for any person knowingly to transport in interstate commerce goods made by convict labor into any state where the goods are intended to be received, possessed, sold, or used, either in the original package or otherwise, in violation of the law of that state. Section 2 provides that all packages containing goods manufactured by convict labor shall be marked so that the name and address of the shipper and the consignee, the nature of the contents, and the name and location of the penal institution where the goods were produced may be readily ascertained by an inspection of the outside of the package.

At the outset it should be noted that the Ashurst-Sumners Act does not lay down a general and indiscriminate prohibition against the interstate transportation of all goods made by convict labor. On the contrary, the prohibitory provisions of Section 1 of the Act operate to prevent the shipment in interstate commerce of goods made by convict labor only in those instances where the transportation is designed to violate the laws of the several states. The statute thus bears on its face evidence that it was enacted for the same purpose, and in the same spirit, described by Chief Justice Marshall in *Gibbons* v. *Ogden,* 9 Wheat. 1, when, in referring to certain Federal laws passed to assist in the execution of the quarantine and health laws of the state, he said (p. 206):

> * * * congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states.

The problems created within the several states by the competition of goods made by convict labor with goods produced by private enterprise has been a matter of public concern for many years. The production of goods by convict labor is a produc-

tion which is either socialized or subsidized. An industry manned by convict labor may be said to be socialized when it is directly conducted by a state or some other political subdivision on its own account and the products are sold in the open market.[1] If convict labor is hired from the state by a private contractor who sells the products of that labor on the open market the contractor receives what amounts to a subsidy, because labor, and other factors of production, are furnished to him at less than their cost to private industry.[2] The dangers and difficulties which this competition presents to both the capital and the labor employed in private enterprise is a matter of common knowledge.[3] Indeed, in *Whitfield* v. *Ohio,* 297 U. S. 431, 439, this

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[1] The different methods of employing convict labor are described in *Prison Labor in the United States*, 1932, Bulletin of the United States Bureau of Labor Statistics, No. 595, 1933, pp. 4–5.

[2] See, for example, *Prison Labor in the United States*, 1932, *supra*, pp. 35–41, where figures are given showing the extremely low wages paid in state penal institutions.

[3] See the *Twentieth Annual Report of the Commissioner of Labor of the United States*, 1906, p. 25; *Convict Labor in 1923*, Bulletin of the United States Bureau of Labor Statistics, No. 372; *Prison Labor in the United States, 1932*, *supra;* see also the report made by the special committee appointed by the Honorable Herbert Hoover, when he was Secretary of Commerce, to consider the problems caused by the competition of goods made by convict labor (a summary of the report is printed in the Congressional Record, Volume 70, Part I, pp. 655–657).

The report of the Senate Committee on Interstate Commerce recommending the passage of the Hawes-Cooper Act

Court took judicial notice of the evil aspects of this competition.

Widespread legislative recognition of the problems created by this competition is shown by the fact that at the present time 32 states have enacted laws prohibiting or otherwise regulating the sale of goods made by convict labor. A list of these states is contained in Appendix A to this brief, *infra,* pp. 49–51.

A state can, of course, effectively control the labor of the convicts in its own penal institutions and the disposition of the products of their labor without aid from the national government. From the necessities of the case, however, such control when limited to the labor of the convicts in the state's own penal institutions is bound to be ineffective. Goods produced by convict labor in other states may be introduced within the borders of such a state by the instrumentalities of interstate commerce and enforcement of a restrictive or regulative policy by the state must necessarily, if it is

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contains the following statement (Senate Report No. 344. 70th Congress, 1st Session, p. 2):

> "From an entirely different viewpoint manufacturers, representing more than $2,500,000,000 in investments and employing both union and non-union labor, were heard by the Committee urging the passage of the measure for the reason, they stated, that under existing conditions the continuous production of prison-made products in certain centralized industries creates the condition by which the entire competitive market is demoralized under which the products of free manufactures are forced into ruinous competition with goods made by convicts.

to be effective, apply to such goods. It is elementary, however, that no state in its attempts to enforce its domestic policy may unconstitutionally impede or burden interstate commerce because by the Constitution the power to regulate that commerce is committed solely to the Federal Government. As a result of the conflict of state legislative policy with the constitutional power of the Federal Government to regulate interstate commerce the several states have been severely handicapped in their attempts to deal with the problem of convict-made goods. Prior to its decision in *Whitfield* v. *Ohio*, 297 U. S. 431, this Court had never passed upon the power of a state to prohibit or otherwise regulate within its borders the sale of such goods when brought into the state through the channels of interstate commerce. In at least three states, however, statutes which merely regulated and did not absolutely prohibit the sale of goods made by convict labor were held by state courts to be unconstitutional under the Federal Constitution, as applied to such goods brought from other states, on the ground that such regulations unconstitutionally impeded and burdened interstate commerce.[4]

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[4] In Ohio and New York statutes requiring such goods to be labelled were held unconstitutional on the ground that they unduly impeded and burdened interstate commerce. See *People* v. *Hawkins*, 157 N. Y. 1, 51 N. E. 257, and *Opinions of the Justices*, 211 Mass. 605, 98 N. E. 334. In Ohio a statute requiring dealers in goods made by convict labor to obtain a license was held invalid on similar grounds. See *Arnold* v. *Yanders*, 56 Ohio 417, 47 N. E. 50.

It was with this legislative and constitutional background in mind that Congress determined to use its power over interstate commerce to prevent the instrumentalities and channels of that commerce from being used to evade and defy the domestic policy of the states as embodied in state law. The first statute passed by Congress dealing with interstate commerce in goods made by convict labor was the Act of Congress of January 19, 1929, 49 U. S. C. A. 60, commonly known as the Hawes-Cooper Act. That Act provided that goods made by convict labor and transported into any state should upon arrival and delivery in that state be subject to its laws, to the same extent as though such goods had been produced within the state and should not be exempt from the operation of those laws by reason of being sold in the original package.

The report of the Senate Committee on Interstate Commerce, recommending the passing of the Hawes-Cooper Act, summarizes the conditions which prompted this legislation in the following language (Senate Report No. 344, 70th Cong., 1st Sess., p. 4):

> State laws against such deception and fraud are ineffective. State labeling laws and similar legislation are unenforceable, and the objectionable conditions which exist are permitted to continue only because States can not enforce their own statutes.
>
> The State, representing the public opinion of that State by enacting laws through its

legislature to prevent the sale of convict-made goods, is powerless to enforce its own will, because other States use its market as a dumping ground for surplus convict-made goods.

With the result that New York (for illustration) regulates the sale of convict-made goods, and the products of its own convicts are eliminated from the State market, but at present the prison contractor may dump upon the New York market the products of convicts from other States.

* * * * *

The result is apparent. The products of convicts are not sold upon the market where "State use" is in force and yet every other State where the contract system is used may do the thing that the law of that State prohibits.

The bill therefore does not interfere with the rights of States, but it does assist in preserving the right of self-determination for each State.

The constitutionality of the Hawes-Cooper Act was upheld by this Court in *Whitfield* v. *Ohio*, 297 U. S. 431.

The Ashurst-Sumners Act was enacted to advance the same legislative policy which prompted the enactment of the Hawes-Cooper Act, by prohibiting the use of the channels and instrumentalities of interstate commerce for the purpose of evading or violating state laws. In recommend-

ing the passage of the Ashurst-Sumners Act the Committee on the Judiciary of the United States Senate stated this policy in the following words (S. R. No. 906, 74th Cong., 1st Sess.): [5]

> The Committee on the Judiciary, to whom was referred the bill (S. 2904) to prohibit the interstate transportation of prison-made goods in certain cases, having considered the bill, report it favorably without amendment and recommend that it be passed.
>
> For many years the Congress has considered bills relating to the sale of prison-made goods. Extensive hearings have been held on these measures which have thoroughly revealed the evils attending the sale of such goods, in the open market, in competition with goods manufactured and produced by free labor. These evils impelled the Congress in 1929 to enact the Hawes-Cooper law, by virtue of which prison-made goods, upon their entry and delivery into a State, became subject to the laws of that State.
>
> At present 21 States, with a population in excess of 75 millions, have enacted laws prohibiting the sale, in the open market, of prison-made goods. This bill is designed to prohibit the transportation of such goods

[5] The Committee on Labor, of the House of Representatives, in recommending the passage of the Act said (74th Cong., 1st Sess., House of Representatives, Report No. 920):

> The present bill H. R. No. 7940 carries further the policy of the Hawes-Cooper Act by supplying a Federal enforcement act to supplement State legislation.

into the States which have thus legislated, in cases in which such goods are to be received or used in violation of the State law. The principle involved in this bill has been frequently sustained by the Supreme Court of the United States. Consequently the members of the committee believe beyond the peradventure of a doubt that the bill is constitutional.

In view of the legislative history of this statute and the avowed motives which prompted its enactment no question can arise as to its purpose. It is not an attempt by Congress to force upon any state, either directly or indirectly, the adoption of a particular policy with respect to the sale or use of goods made by convict labor. On the contrary, the action of Congress in exercising its constitutional power over the instrumentalities and channels of interstate commerce so as to prevent those channels and instrumentalities from being used to evade, to disregard, and to defy the laws of the several states, is an express recognition of the right of each state to adopt whatever policy it may choose with respect to the sale or use of such goods and to effectively enforce that policy within its own borders.

The history of Congressional legislation with respect to interstate commerce in goods made by convict labor parallels the history of Congressional legislation with respect to interstate commerce in intoxicating liquors. In 1890 Congress passed the

Wilson Act (c. 728, 26 Stat. 313) which provided that intoxicating liquor transported into a state should, upon arrival in a state, be subject to the operation and effect of the laws of the state to the same extent and in the same manner as though the liquor had been produced in the state, and should not be exempt from those laws by reason of being introduced into the state in the original package. The parallel with the Hawes-Cooper Act is obvious. The constitutionality of the Wilson Act was sustained by this Court in *In re Rahrer*, 140 U. S. 545. In 1913 Congress supplemented the Wilson Act by enacting the Webb-Kenyon Act (c. 90, 37 Stat. 699), which regulated interstate commerce in intoxicating liquor in substantially the same way in which the Ashurst-Sumners Act regulates interstate commerce in goods made by convict labor.[6] That is to say, the Webb-Kenyon Act made it unlawful to transport intoxicating liquor into a state when the liquor was intended to be used or sold, in the original package or otherwise, in violation of state law. The constitutionality of the Webb-Kenyon Act was sustained by this Court in *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311.

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[6] It should be noted that in 1909 Congress passed a labeling statute comparable in some respects to Section 2 of the Ashurst-Sumners Act. The statute (March 4, 1909, c. 321, 35 Stat. 1137) made it unlawful to ship packages of liquor in interstate commerce unless the packages were labeled on the outside so as to plainly show the name of the consignee, the nature of the contents, and the quantity contained therein.

II

SECTION 1 OF THE ASHURST-SUMMERS ACT IS A VALID EXERCISE OF THE POWERS OF CONGRESS

A. THE CONSTITUTIONALITY OF SECTION 1 FOLLOWS FROM THE DECISIONS OF THIS COURT IN WHITFIELD v. OHIO, 297 U. S. 431, AND CLARK DISTILLING CO. v. WESTERN MARYLAND RAILWAY CO., 242 U. S. 311

Section 1 of the Act forbids interstate transportation of goods made by convict labor if the goods are intended to be sold or used in violation of the laws of the state of their destination.

The power of Congress to enact regulations concerning interstate commerce in goods made by convict labor is established by the decision of this Court in *Whitfield* v. *Ohio,* 297 U. S. 431. In that case Whitfield had been charged with violating an Ohio statute which forbade the sale in the open market of goods made by convict labor. The information laid against Whitfield contained two counts. The first count charged that he had sold on the open market in Ohio goods made by convict labor in Alabama. The second count charged that he sold such goods in Ohio for shipment and delivery by railway express from a point in Alabama. It was stipulated that the goods referred to in the first count were sold in the original package. Whitfield was convicted in the courts of Ohio, and he then petitioned for and obtained a writ of certiorari. On his behalf it was argued before this Court that the Ohio statute was an unlawful regulation of and burden upon interstate commerce. The

Court upheld the conviction on the first count of the information, and because that count considered alone was sufficient to support the penalty inflicted upon Whitfield, found it unnecessary to consider the second count. In its opinion this Court said (pp. 439–440):

> The view of the State of Ohio that the sale of convict-made goods in competition with the products of free labor is an evil finds ample support in fact and in the similar legislation of a preponderant number of the other states. Acts of Congress relating to the subject also recognize the evil. In addition to the Hawes-Cooper Act, the importation of the products of convict labor has been denied the right of entry at the ports of the United States and the importation prohibited. C. 497, Sec. 307, 46 Stat. 689; Title 19 U. S. C. (1934 ed.), Sec. 1307. And the sale to the public in competition with private enterprise of goods made by convicts imprisoned under federal law is forbidden. C. 340, Sec. 5, 46 Stat. 391; Title 18 U. S. C. (1934 ed.), Sec. 744 c.
>
> All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. A state basing its legislation upon that conception has the right and power, so far as the federal Constitution is concerned, by non-discriminating legislation, to preserve

> its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument. The proposition is not contested that the Ohio statute would be unassailable if made to take effect after a sale in the original package. And the statute as it now reads is equally unassailable, since Congress has provided that the particular subjects of interstate commerce here involved "shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case", *In re Rahrer, supra,* p. 562, namely, upon arrival and delivery.

Two conclusions follow from this language:

1. A state has the right and power under the Federal Constitution to prohibit the sale within its boundaries of goods made by convict labor, if that prohibition does not illegally discriminate against the citizens of other states, and subject to such limitations as may arise by reason of the paramount power of Congress to regulate interstate commerce.

2. In the exercise of its power to regulate interstate commerce, Congress can divest goods made by convict labor of the immunity which they enjoy as objects of interstate commerce and subject them to state regulation at an earlier point of time than would be the case in the absence of Congressional legislation.

Putting aside for the moment the question of due process of law which will be considered later

in this brief, the Court's attention is directed to the significance of this decision in relation to the scope of the power of Congress to regulate interstate commerce.

In sustaining the constitutionality of the Hawes-Cooper Act this Court relied on the authority of *In re Rahrer,* 140 U. S. 545. That decision sustained the constitutionality of the Act of August 8, 1890, c. 728, 26 Stat. 313, commonly known as the Wilson Act, which provided that intoxicating liquor carried in interstate commerce into a state should be subject to the laws of that state and not exempt because of its introduction in the original package or otherwise. This Court indicated that the reasoning which led to the sustaining of the Wilson Act was equally applicable to the Hawes-Cooper Act. The Court said (p. 440):

> If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question which we do not now find it necessary to consider), it is clear that the removal of that impediment in the case of prison-made goods must be upheld for reasons akin to those which moved this court to sustain the validity of the Wilson Act.

The parallel between the Wilson Act and the Hawes-Cooper Act is of great significance because of the subsequent legislative and judicial history of liquor legislation. After this Court had sustained the constitutionality of the Wilson Act,

Congress enacted the Webb-Kenyon Act of March 1, 1913, 37 Stat. 699, which made it unlawful to transport intoxicating liquor into a state if the liquor was to be possessed, sold, or used there in violation of state law. This statute made precisely the same provision with respect to intoxicating liquor that Section 1 of the Ashurst-Sumners Act makes with respect to goods manufactured by convict labor. The constitutionality of the Webb-Kenyon Act was sustained by this Court in *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311.[7] In its opinion this Court said (p. 330):

> As the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity, * * *.

If, as this Court stated in the language just quoted, the constitutionality of the Webb-Kenyon Act inevitably followed from the decision in *In re Rahrer*, 140 U. S. 545, then the conclusion is inescapable that the constitutionality of the Ashurst-Sumners Act inevitably follows from the decision

[7] See also *U. S.* v. *Hill*, 248 U. S. 420, and *McCormick* v. *Brown*, 286 U. S. 131.

in *Whitfield* v. *Ohio,* 297 U. S. 431. The one statute is but a larger exertion of the identical power brought into play in the other.

Petitioner's only answer to the logic of this conclusion appears to be that although under the Constitution goods made by convict labor may be subjected to the Hawes-Cooper Act, the "harmless and useful" nature of such goods removes them from the scope of the commerce power, when that power is exercised in the Ashurst-Sumners Act.

Before proceeding to an exposure of the arbitrary and artificial basis upon which this contention of petitioner rests, it will be well to consider the anomalous results which must follow its acceptance. This Court has held, *Whitfield* v. *Ohio,* 297 U. S. 431, that Congress can legislate with respect to goods made by convict labor even though the transportation of those goods in interstate commerce has ceased and the goods are resting in the original package in the hands of the consignee. In that case the practical effect of the Ohio and Federal laws which were upheld was obviously to prevent in a large measure the transportation into Ohio from other states of goods made by convict labor. Petitioner now contends that because of the inherent qualities of convict-made goods Congress cannot pass restrictive and prohibitory legislation with respect to such goods when they are still moving in interstate commerce. Petitioner's contention appears to come to this: It

is constitutional for Congress to consent to state interference with interstate commerce in convict-made goods, but it is unconstitutional for Congress itself to undertake regulation of that commerce. No explanation is advanced as to why the supposed immunity created by the character of the goods should curtail the one exercise of Congressional power and not the other. Indeed, the arbitrary and unreasonable operation of this asserted principle of immunity tends to create the impression that its character is dictated by the exigencies of argument rather than by considerations of logic or authority.

Petitioner suggests that the possession of goods in the original package is a mere incident of interstate commerce and is not an essential part of that commerce in the sense in which transportation is (Pet. brief, pp. 29–31).[8] It is hardly reasonable

[8] At one point in its brief petitioner appears to suggest that the decision in *Whitfield* v. *Ohio*, 297 U. S. 431, could be explained as a limitation on the original package doctrine and that consequently it was not necessary in that case for this Court to pass upon the constitutionality of the Hawes-Cooper Act. (Pet. brief, pp. 29–33.) After having referred to its decision in *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, the Court clearly stated, however, that its decision rested on the Hawes-Cooper Act and not on a limitation of the original package doctrine. After quoting from its opinion in *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, the Court said (p. 440):

> Whether that view of the doctrine as applied to state taxation should now be given a more general application, the Hawes-Cooper Act, being determinative of the case now under review, makes it unnecessary for us to decide.

to suppose, however, that the power of Congress over goods made by convict labor is greater when it legislates with respect to the mere incidents of interstate commerce than when it legislates as to commerce itself. To accept that supposition would be to establish the novel constitutional doctrine that the scope of the commerce power becomes greater as the subject matter on which it operates recedes from the current of interstate commerce.

B. PETITIONER'S ARGUMENT ASSUMES, WITHOUT WARRANT, THAT THE USE OF THE INSTRUMENTALITIES OF INTERSTATE COMMERCE FOR THE PURPOSE OF VIOLATING STATE LAWS IS LEGITIMATE AND PROPER

Petitioner's insistence throughout its brief that goods made by convict labor are useful and harmless articles of commerce, serves to obscure the evil character of the commerce which is prohibited by Section 1 of the Act. The evil arises from the fact that the disposition for which the goods are destined is one which the state of destination in the exercise of its power to protect its own general welfare has declared to be illegitimate within the state. It may be conceded that the evil thus arises from the unlawful use to which the objects of the commerce are to be put and not from inherent qualities of those objects themselves. but that concession does not disprove the evil or remove it from the scope of the commerce power.

The determination of whether the local sale of goods made by convict labor is inimical to the public welfare is a matter committed to the discre-

tion of the legislative bodies of the several states. Thirty-two states have passed laws forbidding or otherwise regulating the sale, within their borders, of goods made by convict labor. In *Whitfield* v. *Ohio,* 297 U. S. 431, 439, this Court recognized the right of the states to adopt such regulative and restrictive legislation. Petitioner may be persuaded that the states which have adopted this legislation have acted upon an erroneous conception of the general welfare. That fact is not important. Whatever merit there may be in petitioner's view as to the relation between the general welfare of the states and the sale of goods made by convict labor, that view is not one which the Federal Constitution requires the states to accept.

Petitioner appears to admit that Congress can close the channels of interstate commerce to articles which because of "their inherent nature or *their intended use*" are inimical to the health, safety, morals, or "*general welfare of the public.*" [Italics supplied.] (Pet. brief, p. 15.) Goods made by convict labor and intended for use or sale in violation and defiance of the laws of a state are goods whose intended use is inimical to the general welfare of that state and it was undoubtedly for this reason that the District Court refused to make a finding that the goods which petitioner sells are not in and of themselves in any particular harmful to the general welfare of the communities into

which they are shipped. Thus, even if petitioner's own definition of the scope of the commerce power is accepted, that power is wide enough to encompass legislation designed to prevent the use of the instrumentalities of interstate commerce for the evil purpose of thwarting and violating valid state laws.

Petitioner, however, takes the position that it is not possible for the goods which it sells in interstate commerce to be used in a way inimical to the general welfare of the states into which the goods are shipped. Upon examination petitioner's argument on this point appears to resolve itself into the contention that only articles which are inherently evil, deleterious, or dangerous can be inimical to the general welfare so as to fall within the scope of the commerce power. But it is no answer for petitioner to insist upon the harmless and useful qualities of prison-made goods. It is the character of the *traffic* and not the character of the *goods* which is important, as is indicated by the fact that stolen motor cars, which obviously do not differ in their inherent characteristics as objects from motor cars not stolen, may validly be barred from the channels of interstate commerce. *Brooks* v. *United States*, 267 U. S. 432. Whatever the intrinsic character of the goods may be, their transportation in interstate commerce with the intent to sell or to use them in violation of state laws is not harmless and innocent as petitioner insists.

Implicit in petitioner's legal argument with respect to the inherent qualities of goods made by convict labor is an indefensible assumption as to petitioner's right to pervert the instrumentalities of interstate commerce to improper and illegal ends. It must be admitted that no state has the power under the Constitution to prevent the use of the instrumentalities of interstate commerce for the purpose of violating its laws. Petitioner insists that the Constitution likewise forbids the Federal Government to regulate the instrumentalities of interstate commerce so as to prevent their use for that purpose. Underlying this insistence is the assumption that petitioner, as a Kentucky corporation, has a right to use the instrumentalities of interstate commerce for the purpose of violating the laws of more than half the states and that under the Constitution no power exists, either in the states or in the National Government, which can deal with that evil. And it should be noted that the evil is not one which is local in character or affects interstate commerce only indirectly, but, on the contrary, is an evil which arises from actual use of the instrumentalities of commerce and thus inheres in interstate commerce itself. This Court exposed the fallacy of a similar contention in *In re Rahrer,* 140 U. S. 545, in the following words (pp. 561, 562):

> In surrendering their own power over external commerce the States did not secure

absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.

By the adoption of the Constitution the ability of the several States to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted. No affirmative guaranty was thereby given to any State of the right to demand as between it and the others what it could not have obtained before; * * *.

* * * * *

The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge.

Petitioner's contention may thus be summarized as an assertion of the right to project the public policy of the Commonwealth of Kentucky with respect to goods made by convict labor beyond the borders of Kentucky and to enforce that policy through the instrumentalities of interstate commerce within the borders of other states in defiance of laws which those states have adopted pursuant to a different public policy, coupled with a resolute denial that the Federal Government, which under our system of government is the only authority having jurisdiction over interstate commerce, has any power to regulate the interstate transportation

of goods so as to prevent this widespread invasion of state sovereignty. Nothing less than a peremptory command by the language of the Constitution or by the decisions of this Court could justify the acceptance of so anomalous a proposition. No such justification can be made. The premise upon which petitioner rests its entire argument has no basis either in the language of the Constitution or in the decisions of this Court.

C. IN THE EXERCISE OF ITS POWER TO REGULATE INTERSTATE COMMERCE CONGRESS CAN RESTRICT OR PROHIBIT ANY USE OF THE INSTRUMENTALITIES OF THAT COMMERCE FOR AN EVIL OR IMPROPER PURPOSE AND ITS POWER IN THAT RESPECT IS NOT LIMITED TO RESTRICTING OR PROHIBITING COMMERCE IN OBJECTS WHICH ARE INHERENTLY DELETERIOUS OR DANGEROUS

The power of Congress to regulate interstate commerce is granted by the Constitution without qualifying or restricting words. This Court has described that power as plenary and exclusive. See *Gibbons* v. *Ogden,* 9 Wheat. 1, 196–197, and *Hoke* v. *United States,* 227 U. S. 308, 320. It cannot be doubted, and indeed petitioner admits (Pet. brief, p. 18), that by the exercise of the commerce power Congress may accomplish, within the scope of the commerce power, the same purposes which may be accomplished by a state in the exercise of its police power. See *Brooks* v. *United States,* 267 U. S. 432, 436.

Numerous decisions of this Court have established that the power to regulate includes the power to prohibit. And the power to prohibit has been sustained by this Court when applied to objects not

intrinsically evil, deleterious or dangerous. Thus, a lottery ticket is merely a piece of paper which has no inherent evil qualities, yet the transportation of lottery tickets in interstate commerce may be forbidden. *Champion* v. *Ames,* 188 U. S. 321. So far as its inherent qualities are concerned, a stolen motor car is like any other car, yet the transportation of stolen motor cars in interstate commerce may be forbidden. *Brooks* v. *United States,* 267 U. S. 432. This Court has upheld the Pure Food & Drug Act not only as applied to deleterious and dangerous articles, but also as applied to articles which are merely misbranded. *Weeks* v. *United States,* 245 U. S. 618; *Seven Cases* v. *United States,* 239 U. S. 510. It was because of the evil character of the traffic regulated and not because of any inherent evil in the objects moving in that traffic that Congress enacted such legislation as the Mann Act, whose constitutionality was sustained in *Caminetti* v. *United States,* 242 U. S. 470, and *Hoke* v. *United States,* 227 U. S. 308, and the act forbidding the transportation of kidnaped persons in interstate commerce (48 Stat. 781). See *Gooch* v. *United States* (C. C. A. 10th), 82 F. (2d) 534, cert. denied April 13, 1936. None of the decisions of this Court referred to above can be squared with the notion of petitioner that there is in the nature of the commerce power itself, quite apart from any question of due process of law, a limitation which prevents that power from operat-

ing upon an article of commerce unless that article is inherently evil or deleterious as an article.

The true rule with respect to the scope of the commerce power was laid down by this Court in *Brooks* v. *United States,* 267 U. S. 432, in these words (pp. 436–437):

> Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.

In the application of this rule it may be important to determine whether Congress is actually regulating an evil which inheres in interstate commerce or is attempting to regulate something outside that commerce, but so far as the scope of the commerce power is concerned the inherent character of the objects regulated is not of controlling moment.

It is true that the evil character of the article itself might conceivably, in an appropriate case, be relevant to the question of whether a particular regulation was consistent with the due process clause of the Fifth Amendment, but that question is different from the question as to the scope of the Congressional power to regulate commerce. So far as the scope of that power is concerned

this Court has often recognized that the use of the instrumentalities of interstate commerce for the purpose of evading or violating state laws is an evil and that the power of Congress over interstate commerce may be invoked to destroy that evil.[9] See *Gibbons* v. *Ogden*, 9 Wheat. 1, 205; *Champion* v. *Ames*, 188 U. S. 321; *Hoke* v. *United States*, 227 U. S. 308, 321; *In re Rahrer*, 140 U. S. 545, 562; *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311; *Brooks* v. *United States*, 267 U. S. 432, 438–439.

In *Champion* v. *Ames*, 188 U. S. 321, this Court said (p. 357):

> In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lot-

[9] *Cf.* the Lacey Act, c. 553, 31 Stat. 187, which forbids interstate commerce in game killed in violation of local game laws. The constitutionality of this statute was sustained in *Rupert* v. *United States* (C. C. A. 8th), 181 Fed. 87. See also the Act of July 3, 1918, c. 128, 40 Stat. 755, which makes it unlawful to transport in interstate commerce any bird captured or killed contrary to the laws of a state or territory. This Statute was enforced in *Bogle* v. *White* (C. C. A. 5th), 61 F. (2d) 930. And see *Griswold* v. *The President of the United States*, 82 F. (2d) 922, where the Circuit Court of Appeals for the Fifth Circuit upheld the constitutionality of the Act of Congress approved February 22, 1935, 49 Stat. 30, commonly known as the Connally Act, which prohibits the shipment in interstate commerce of oil produced in violation of the laws of a state.

> teries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce.

So far as authority is concerned, petitioner appears to hang its distinction between articles inherently safe and harmless and articles inherently dangerous and deleterious, on two pegs. (Pet. brief, p. 33.) One of these pegs is certain language used by this Court in *Clark Distilling Company* v. *Western Maryland Railway Company,* 242 U. S. 311, in disposing of the contention that a decision upholding the Webb-Kenyon Act would unwarrantedly extend the scope of the commerce power. That language follows (p. 332):

> Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to

> the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control, and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which, after all, dominates and controls the question here presented; that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been *repugnant to the great guarantees of the Constitution* but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which *under the constitutional guarantees* such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the *guarantees of the Constitution,* embrace. [Italics supplied.]

This language immediately follows a paragraph in which the Court discussed the application of the due process clause of the Fifth Amendment to the Webb-Kenyon Act. That fact, together with the circumstance that in the passage quoted above the

Court speaks of the limitation imposed "by the guarantees of the Constitution", words which the Court would hardly have used had it intended to denote an unexpressed and merely implied limitation on the scope of the commerce power, indicates plainly that the Court considered the qualities of the object regulated not as determinative of the scope of the commerce power but as relevant to a consideration of the question of due process of law.

Indeed, this Court could hardly have taken the view in *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311, that intoxicating liquor was so intrinsically evil or deleterious that it was not a legitimate object of commerce without overruling certain of its own decisions. It is to be noted that this Court held, both before and after *In re Rahrer*, 140 U. S. 545, that intoxicating liquor was a legitimate object of commerce. See *Leisy* v. *Hardin*, 135 U. S. 100; *Louisville & Nashville R. R. Company* v. *Cook Brewing Company*, 223 U. S. 70, 82. Indeed, it was only because liquor was a legitimate object of commerce that such legislation as the Wilson Act and the Webb-Kenyon Act was necessary in order to enable the several states to enforce their domestic policies. If liquor, because of its inherent, deleterious, or fraudulent qualities, had not been a legitimate subject of commerce, then it is probable that the states could have regulated or restricted its sale, even in the original package.

See *Plumley* v. *Massachusetts*, 155 U. S. 461, 474; *Peirce* v. *New Hampshire*, 5 How. 504, 599–600. *Cf. Schollenberger* v. *Pennsylvania*, 171 U. S. 1.

In addition to the language of this Court in *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311, the petitioner relies upon the decision of this Court in *Hammer* v. *Dagenhart*, 247 U. S. 251, and it is therefore necessary to consider that decision in its application to the instant case.

D. SECTION 1 OF THE ASHURST-SUMNERS ACT IS A REGULATION OF AN EVIL WHICH INHERES IN INTERSTATE COMMERCE; IT IS NOT AN ATTEMPT TO REGULATE A MATTER OF LOCAL CONCERN AND HENCE THE DECISION IN HAMMER *v.* DAGENHART, 247 U. S. 251, HAS NO APPLICATION IN THE INSTANT CASE

The statute which was declared invalid in *Hammer* v. *Dagenhart*, 247 U. S. 251, forbade the transportation in interstate commerce of articles produced in factories where child labor had been employed within 30 days preceding shipment. This Court held that the statute was not in fact a regulation of interstate commerce, but an attempted regulation of local production disguised as an exercise of the commerce power. This Court's view that the evil at which the statute was directed was not an evil which inhered in interstate commerce is clearly indicated by the language used by the Court in distinguishing *Champion* v. *Ames*, 188 U. S. 321, and other cases where prohibitory statutes had been sustained. The Court said (p. 271):

> In each of these instances the uses of interstate transportation was necessary to the ac-

> complishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

Unlike the Ashurst-Sumners Act, the Child Labor Law not only did not disclose by its provisions an intent to regulate an evil which inhered in interstate commerce itself, but, on the contrary, disclosed strong evidence of being enacted for the purpose of dealing with a purely local evil.[10] In contrast with the Child Labor Law the Ashurst-Sumners Act shows on its face that it is not an attempt by Congress to dictate the policy which each state shall follow within its own borders with respect to the management of its penal institutions or the sale of goods made by convict labor. Although the prohibitory provisions of Section 1 apply uniformly within the field subject to Congressional regulation, they apply only to the extent of preventing the use of the instrumentalities of interstate commerce for the purpose of violating the laws of those states which have prohibited or re-

[10] If the Child Labor Law had prohibited interstate transportation of goods made by child labor into states where their sale or disposition was forbidden by local law instead of prohibiting all interstate transportation of such goods, regardless of the laws of either the state of origin or the state of destination, the situation in *Hammer* v. *Dagenhart* would have been somewhat analogous to the case now under consideration.

stricted the sale of goods made by convict labor. Such prohibitory provisions operate within the field of interstate commerce to prevent the use of interstate transportation for the purpose of accomplishing harmful and evil results, prohibited by state laws. They cannot be said to invade the reserved powers of the states.[11]

Petitioner insists, however, that because Congress cannot legislate with respect to the local manufacture of goods by convict labor or the local sale of such goods it has no power to enact Section 1 of the Ashurst-Sumners Act (Pet. brief p. 18). If this contention is sound, the scope of the commerce power is narrow indeed. All articles of commerce necessarily have a local origin and in many instances are ultimately disposed of in local transactions. Any regulation of interstate commerce necessarily affects to some extent local origin and ultimate local disposition. But surely that circumstance does not destroy the possibility of Federal control within that field which is committed to the Federal Government by the Constitution. Congress has no power to legislate with respect to the local theft of motor cars, it

[11] The fact that the Ashurst-Sumners Act is a regulation of interstate commerce and not an attempt to exercise some other power not granted to the Federal Government serves to distinguish such decisions as those in *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20; *Hill* v. *Wallace*, 259 U. S. 44; *Linder* v. *United States*, 268 U. S. 5, 17; *United States* v. *Constantine*, 296 U. S. 287.

has no power to forbid local lotteries, it has no power to legislate with respect to the local manufacture of foods and drugs, and it has no power to legislate with respect to local immorality. Its power, however, to close the channels of interstate commerce to evils which result from such local activities is established beyond doubt.[12] The validity of an exercise of the commerce power cannot be tested by looking to see whether Congress possesses some other power which it has not attempted to exercise.

E. SECTION 1 DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

An exercise of the commerce power, like the exercise of any of the other granted powers of Congress, is subject to the limitations imposed by the due process clause of the Fifth Amendment. Those limitations require that the power shall not be exercised in an unreasonable, arbitrary, or capricious way and that the regulatory means selected shall have a real and substantial relation to the object sought to be attained. *Nebbia* v. *New York,* 291

[12] See *Hoke* v. *United States*, 227 U. S. 308, where the Court said (p. 322):

> Let an article be debased by adulteration, let it be misrepresented by false branding, and Congress may exercise its prohibitive power. It may be that Congress could not prohibit the manufacture of the article in a State. It may be that Congress could not prohibit in all of its conditions its sale within a State. But Congress may prohibit its transportation between the States, and by that means defeat the motive and evils of its manufacture.

U. S. 502, 525. In considering the question of due process of law with regard to the provisions of Section 1, it is important to note the scope of those provisions. Section 1 does not prohibit all interstate commerce in goods made by convict labor. The prohibition applies only when the goods are intended to be used in violation of state law. This limitation on the right to use the instrumentalities of interstate commerce has a real and substantial relation to the evil at which the Act is directed, that is, the use of those instrumentalities for the purpose of evading and violating state laws. It cannot be said that the provisions of Section 1 are unreasonable, arbitrary, or capricious in their operation unless it be assumed that the state legislation which calls those provisions into operation is itself unreasonable, arbitrary, or capricious. It follows that if state laws forbidding or restricting the sale of such goods are valid under the due process clause of the Fourteenth Amendment, then Section 1 must be unobjectionable under the due process clause of the Fifth Amendment.[13] It is significant that in *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311, this view was taken by this Court of the relation existing between State liquor laws and the Webb-Kenyon Act. This Court said (p. 332):

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[13] The due process clause of the Fifth Amendment imposes no greater restriction upon Federal power than the due process clause of the Fourteenth Amendment imposes upon state power. *Nebbia* v. *New York*, 291 U. S. 502, 525.

> It is only necessary to point out that the considerations which we have stated dispose of all contentions that the Webb-Kenyon Act is repugnant to the due process clause of the Fifth Amendment, since what we have said concerning that clause in the Fourteenth Amendment as applied to state power is decisive.

Petitioner appears to realize that any attack on the Ashurst-Sumners Act based on the alleged denial of due process of law must be wide enough to attack state legislation prohibiting or restricting the sale of goods made by convict labor. (See Pet. brief, pp. 17–18.) So far as such a contention relates to state legislation, it is answered by the decision of this Court in *Whitfield* v. *Ohio*, 297 U. S. 431, where in its opinion this Court used language which can only mean that such state legislation does not violate the due process clause of the 14th Amendment. This Court said (pp. 439–440):

> The view of the State of Ohio that the sale of convict-made goods in competition with the products of free labor is an evil, finds ample support in fact and in the similar legislation of a preponderant number of the other states. Acts of Congress relating to the subject also recognize the evil. In addition to the Hawes-Cooper Act, the importation of the products of convict labor has been denied the right of entry at the ports of the United States and the importation prohibited. C. 497, § 307, 46 Stat. 689; Title 19

U. S. C. (1934 ed.), § 1307. And the sale to the public in competition with private enterprise of goods made by convicts imprisoned under federal law is forbidden. C. 340, § 5, 46 Stat. 391; Title 18 U. S. C. (1934 ed.), § 744c.

All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. A state basing its legislation upon that conception has the right and power, so far as the federal Constitution is concerned, by non-discriminating legislation, to preserve its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument. The proposition is not contested that the Ohio statute would be unassailable if made to take effect after a sale in the original package.

This approval of the Ohio statute forbidding the sale of goods made by convict labor necessarily implies approval of less drastic regulatory statutes such as those which require labeling or those which require the obtaining of a license by dealers in convict-made goods.[14]

[14] Nothing in the concept of due process of law prevents a government from requiring useful and harmless articles of commerce to be labeled so as to disclose their true character or their origin. If purchasers do not wish to buy an article if it is made by a particular manufacturer or class of manufacturers, disclosure may be required so that the purchasers can exercise their choice (*Federal Trade Commission* v.

Much of petitioner's argument appears to amount to the contention that the doctrine of due process of law prevents both the States and the Federal Government from prohibiting or regulating the sale of goods made by convict labor because those goods are not inherently dangerous or deleterious. Even if the decision of this Court in *Whitfield* v. *Ohio*, 297 U. S. 431, is disregarded, no such general proposition as petitioner advances can be sustained. Nothing in the Fourteenth or Fifth Amendments prevents a state or the Federal Government, when it acts within the scope of one of its granted powers, from regulating even harmless objects and occupations for the broad purpose of promoting the general welfare. *Nebbia* v. *New York*, 291 U. S. 502, 524. See also *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357; *Mugler* v. *Kansas*, 123 U. S. 623, 633; *Murphy* v. *California*, 225 U. S. 623, 628. This Court has said that the power of a government is not limited, as is sometimes claimed, to the making of regulations for the promotion of such matters as health, morals, and safety, but "embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public

Royal Milling Co., 288 U. S. 212, 216), and it makes no difference that the choice may be "dictated by caprice or by fashion or perhaps by ignorance." *Federal Trade Commission* v. *Algoma Lumber Company*, 291 U. S. 67, 78.

safety." *C. B. & Q. Ry. Co.* v. *Drainage Commissioners,* 200 U. S. 561, at 592; *Eubank* v. *Richmond,* 226 U. S. 137, at 142; *Sligh* v. *Kirkwood,* 237 U. S. 52, at 59. This Court has also said that this power to promote the general welfare "may be applied to all kinds of property, even that which in its nature is harmless." *Bowman* v. *Chicago &c. Railway Co.,* 125 U. S. 465, 501.

So far as the national government is concerned, it has been pointed out above (pp. 30–31, *supra*) that many regulations of interstate commerce have been sustained by this Court which did not relate to articles of commerce which were inherently evil, dangerous or deleterious. Indeed this Court has held that in the exercise of its power to regulate interstate commerce Congress may regulate and restrict transactions in such a harmless and useful commodity as grain because there is a "public national interest" in such transactions. *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 41.

III

SECTION 2 OF THE ASHURST-SUMNERS ACT IS A VALID EXERCISE OF THE POWERS OF CONGRESS

Section 2 of the Ashurst-Sumners Act requires all packages containing goods manufactured by convict labor which are shipped in interstate commerce to be plainly and clearly marked so that the name and address of the shipper, the name and address of the consignee, the nature of the contents

and the name and location of the penal institution where the goods were produced may be readily ascertained by an inspection of the outside of the package.

The power of Congress to require the labeling of goods moving in interstate commerce is too well established to require discussion. *Seven Cases* v. *United States,* 239 U. S. 510; *Weeks* v. *United States,* 245 U. S. 618. Cf. *United States* v. *Freeman,* 239 U. S. 117. Petitioner appears to admit that if Section 1 of the Act is a valid exercise of the powers of Congress no objection can be made to Section 2 (Pet. brief, pp. 54–56). No other conclusion is possible because the provisions of Section 2 are intended to aid in enforcement of Section 1 and they are reasonable and appropriate means to that end.[15] It should also be noted that quite apart from Section 1, Section 2 may be justified as a reasonable and appropriate exercise of the

[15] There are analogous provisions in the Lacey Act, c. 553, 31 Stat. 188. Section 4 of that Act provides that it shall be unlawful to ship animals and birds in interstate commerce without marking the package so that the name and address of the shipper, and the nature of the contents can readily be ascertained by examining the outside of the package. This section was obviously designed to aid in the enforcement of the provisions of Sections 3 and 5 of that Act. In *Rupert* v. *United States*, 181 Fed. 87 (C. C. A. 8, 1910) the court said of Section 4 (p. 91):

> And to aid in the detection of such crimes, Congress had the authority to provide that all such interstate shipments should be plainly marked so that any person by a casual inspection would know the contents of the package.

commerce power designed to prevent the use of the instrumentalities of interstate commerce for the purpose of violating such state statutes as the Ohio statute which was upheld in *Whitfield* v. *Ohio,* 297 U. S. 431.

So far as the question of due process of law is concerned, the considerations which have been discussed above in connection with constitutionality of Section 1 are decisive of the constitutionality of Section 2. In its brief, petitioner does not attempt to contend that the labelling requirement, considered by itself, is so expensive or so arbitrary and burdensome as to be unreasonable. It is true that Section 2 requires all packages containing goods made by convict labor to be labelled, regardless of the law of the state of their destination. There can be no objection to such a requirement. "It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government." *Purity Extract Company* v. *Lynch,* 226 U. S. 192, 201. See *Rupert* v. *Caffey,* 251 U. S. 264, and *Everard Breweries* v. *Day,* 265 U. S. 545.

CONCLUSION

It is respectfully submitted that the decree of the Circuit Court of Appeals for the Sixth Circuit should be affirmed upon the ground that the

Ashurst-Sumners Act is a valid exercise of the powers of Congress.

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APPENDIX A

STATES WHICH FORBID THE SALE OF GOODS MADE BY CONVICT LABOR

Arizona: Revised Code of Arizona (Supp. 1936), §§ 5333a–5333f.

California:[1] Penal Code of California (1931), §§ 679a, 1586. General Laws of California (1931), §§ 8062, 8062a.

Colorado: Colorado Session Laws (1933), ch. 149.

Idaho: Idaho Session Laws (1933), ch. 216.

Illinois: Revised Statutes of Illinois (1935), ch. 108, §§ 82, 90 (2).

Kansas:[1] Laws of Kansas (1935), ch. 291.

Louisiana: Acts of Louisiana (1936), ch. 169.

Massachusetts: Annotated Laws of Massachusetts (1933), ch. 127, §§ 67, 67A.

Michigan:[1] Compiled Laws of Michigan (Supp. 1935), § 17636–5.

Mississippi:[1 2] Laws of Mississippi (1934), ch. 147, § 1; ch. 296.

Montana: Revised Code of Montana (1935), § 11573.1.

Nebraska:[1] Laws of Nebraska (1935) ch. 183, §§ 10–11.

New Hampshire: Laws of New Hampshire (1933), ch. 42.

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[1] In these States there are certain exceptions to the general prohibitory provisions.

[2] The language of the Mississippi statutes is ambiguous but the legislative intent is clear.

New Jersey: Laws of New Jersey (1931), ch. 235.
New York: Laws of New York (1930), ch. 136. Laws of New York (1933), ch. 26.
North Carolina:[3] North Carolina Code (1935), § 4468a.
Ohio: Page's Code of Ohio (Supp. 1935), §§ 2228–1, 2228–2.
Oregon:[3] Laws of Oregon (1935), ch. 128.
Pennsylvania: Purdon's Pennsylvania Statutes (1930), Tit. 71, § 602 (c). Purdon's Pennsylvania Statutes (Supp. 1935), Tit. 61, § 257. (*See* Purdon's Pennsylvania Statutes (1930), Tit. 61, §§ 251–254.)
Rhode Island: Laws of Rhode Island (Jan. Sess., 1934), ch. 2106, § 3.
Texas: Vernon's Texas Statutes (1936), Penal Code, Art. 1137i.
Utah: Laws of Utah (1933), ch. 67, 68.
Virginia:[3] Virginia Code (1936), §§ 2073a, 2073b, 5009b.
Washington: Acts of Washington (1933), ch. 178.

STATES WHICH DO NOT PROHIBIT THE SALE OF GOODS MADE BY CONVICT LABOR BUT WHICH REQUIRE THE GOODS TO BE LABELLED

Georgia:[4] Laws of Georgia (Spec. Sess. 1931), p. 90.
Indiana:[5] Burns' Indiana Statutes, Annotated (1933), §§ 42–601 to 42–612.

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[3] In these States there are certain exceptions to the general prohibitory provisions.
[4] There is a special sales tax of 15% applicable to exchanges of prison-made goods.
[5] Dealers who handle prison products must secure a special state license.

Iowa: Acts of Iowa (1933), ch. 50, § 1.
Maine:[6] Revised Statutes of Maine (1930), ch. 152, §§ 14, 24, 39. Laws of Maine (1931), ch. 221. Laws of Maine (1933), ch. 1, §§ 331, 338.
Minnesota: Code of Minnesota (1936), § 3976.
New Mexico: New Mexico Statutes (1929), §§ 130–176, 130–177.
South Dakota: Acts of South Dakota (1933), ch. 158. Acts of South Dakota (1935), ch. 170.
Wisconsin: Laws of Wisconsin (1935), ch. 178.

[6] The statute is applicable only to goods produced in the Maine State Prison.

U. S. GOVERNMENT PRINTING OFFICE: 1938